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No. 93-2025

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDITH SPALETTA,

Petitioner,

V.

COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCIATION

and COUNTY OF MENDOCINO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

REPLY TO BRIEF IN OPPOSITION

JAMES REYER, ESQUIRE
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Santa Rosa, California 95402
(707) 576-1244

Counsel for Petitioner

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REPLY TO RESPONDENT OPPOSITION

A. Nature of Case

This case is about the high cost to the legal system when a retirement board initiates litigation, under the guise of requesting an injunction against a disability pension applicant, based on transparent allegations of "fact," when the absence of substantiation of such allegations is conspicuous from the very documents of record to which the self-same allegations make reference.

This case is about the high cost to the integrity of the justice system when a Respondent composes for presentation to this Supreme Court a "wrongful act" of refusal from a document of record that (1), in the first instance, has no relation to the unsubstantiated refusal alleged in the second amended complaint

that is the subject matter of the state appellate court November 22 Decision under consideration in Petitioner's Petition and (2), in the second instance, addresses only the May 22, 1992 Tim Knudson administrative order that the state court of appeal in its November 22 Decision determined was found by the state trial court to be an illegitimate order. See Petition for Writ of Certiorari, Statement of the Case, Section C.1., at Pages 10 and 11, and Section C.4., at Page 15, footnote 2.

B. Brief in Opposition

1. Brief in Opposition Misquotes June 4, 1992 Letter.

Respondent in its Brief in Opposition presents to this Supreme Court as evidence of an alleged "wrongful act" of refusal on the part of Petitioner a letter received on June 4, 1992 (the "June 4, 1992 Letter"):

> "Petitioner argues that the injunction issued by the California trial court compelling her to attend a medical examination is unlawful. She contends that she did not refuse to attend the medical exam ordered by the Association on August 21, 1992 because no specific time or date [sic-or place] were set by the Association for the exam. What Petitioner fails to mention is the letter written by her attorney to the Association's attorney on or about June 4, 1992. In that letter Petitioner's attorney states: '<u>Mrs. Spaletta does decline to attend the examination s you have set up.</u>' (emphasis added)." See Appendix at A4.
>
> Respondent Brief in Opposition, at Pages 5 and 6.

The very June 4, 1992 Letter referred to at Appendix A4 to Respondent's Brief in Opposition conspicuously demonstrates the transparency of the allegation of the "fact" of the "wrongful act" of refusal by Petitioner presented by Respondent to this Supreme Court therein.

The absence of substantiation in Respondent's Brief in Opposition of the above allegation of refusal is conspicuous as a mis-quotation from the text of the

June 4, 1994 Letter from Petitioner's counsel, the very document to which the self-same allegation makes reference:

> "I shepardized 31723 and could find nothing to indicate to me that your interpretation of the statute, that a medical examination at the expense of the member AND a medical examination by another doctor, in this case, an insurance defense doctor, may be required.
>
> "If you can send me authority for your interpretation, I will be glad to consider it.
>
> "If you cannot, (emphasis added) then Mrs. Spaletta does decline to attend the examinations you (emphasis added) have set up."
>
> See Appendix, at Page A4, attached hereto.
> See also Respondent's Brief in Opposition, Appendix, at Page A4. (CT 17-18)*

Respondent in its Brief in Opposition submitted to this Supreme Court anticipates that this Court will not

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* The reference "CT" in this reply brief indicates herein the Clerk's Transcript in the state trial court record in this appeal. The reference "RT" herein means the Reporter's Transcript included in that record.

compare the Respondent's transparent allegation of a "wrongful act" of refusal in that brief with the text of the very document attached thereto to which the self-same allegation makes reference -- as the state court of appeal failed to compare Respondent's allegations in its briefs below to the documents of record before it in this case.

2. June 4, 1992 Letter addresses May 22, 1992 Tim Knudson administrative order, found by trial court to be an illegitimate order, not authorized by retirement association board of directors.

In addition, the state court of appeal found in its November 22 Decision that the May 22, 1992 Tim Knudson administrative order, the order addressed by the June 4, 1992 Letter from Petitioner's attorney, was determined by the state trial court to be an illegitimate order:

> "At the same, time the County applied to the Association on her behalf for disability retirement. Retirement

> Administrator Tim Knudson ordered Spaletta to submit to a medical examination. When Spaletta refused, the Association requested an injunction compelling her to attend the examination. The court sustained Spaletta's demurrer to the complaint, ruling that the Association's complaint failed to state a claim because an underlying administrative order was issued by the retirement administrator rather than the Association's board of directors."
>
> November 22 Decision, at Petition, Appendix Page A3.
>
> See Petition for Writ of Certiorari, Statement of the Case, Section C.1., at Pages 10 and 11, Section C.4, at Page 15, footnote 2, and November 22 Decision, at Appendix Page A3.

3. June 4, 1992 Letter evidences absence of substantiation of allegation of "wrongful act" of refusal before state trial court and state court of appeal.

The June 4, 1992 Letter introduced to this Court in Respondent's Brief in Opposition demonstrates the absence of substantiation of the allegation of the "fact" of wrongful refusal upon which Respondent initiated litigation, in the first instance, against Petitioner, a disability pension applicant who invokes

her pension rights for physical injuries sustained as a local county courthouse employee.[1]

Respondent's Brief in Opposition, in addition, ignores the face of documents that are central to the record in this case:

> "At no time after issuance of the Association's August 21, 1992 order did Petitioner come forth to be examined.[2] (footnote added) Despite

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[1] The June 4, 1992 Letter has no relevance to the second amended complaint, filed October 26, 1992, that is the subject of the state court of appeal November 22 Decision before this Court in Petitioner's Petition. The June 4, 1992 Letter, in addition, has no relevance to the first amended complaint, filed August 21, 1992, that the state trial court found on October 26, 1992 failed to state a cause of action on the sole basis that the retirement board had a remedy at law. (CT 242-243) (RT 34:1-2).

[2] The August 21 administrative order set no examination date, time or place to be examined. See Petition, at Appendix Pages A26-A27. See also Petition, Statement of the Case, Section C.2., at Page 12. The August 21, 1992 order that set no time, date or place for the second and third medical examinations was served on Petitioner on August 21, 1992, the same day that the first amended complaint, fictionally alleging Petitioner's non-

repeated attempts to schedule the exam, Petitioner continued her refusal to be examined.[3] (footnote added) That is why the Association was forced to file a complaint in the Superior Court seeking an injunction compelling Petitioner to attend the exam.[4] (footnote added) Not once throughout the lower court proceedings did Petitioner simply request that a date be set for the exam."[5] (footnote added)

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compliance with the self-same administrative order, was filed with the state trial court.

[3] See footnotes 2 and 5. The fatuity of this allegation is evidenced at CT 183:1-10, 205:7-13.

[4] The original complaint in this litigation was filed on June 15, 1992 [over two (2) months prior to the August 21, 1992 administrative order], on the basis that the June 4, 1992 Letter, constituting the Appendix of Respondent's Brief in Opposition, was a refusal to attend medical examinations. The trial court, however, dismissed the original complaint on July 16, 1992, on the basis that the board of directors of the retirement board had not authorized "the examinations you have set up." (CT 112). (RT 8:17-13:13). See Pages 5 and 6 hereof.

[5] Petitioner offered at the August 12, 1992 meeting before the board of directors of the retirement association to attend a second medical examination by "an independent doctor and not one paid to deprive me of my retirement benefits." (CT 213, 215) (CT 203-205) (RT 30:27-31:3). The board of directors rejected that proposal and passed the August 12 motion requiring attendance at a single joint

REPLY ARGUMENTS

I. Petitioner's freedom to control intrusions to her bodily and psychological integrity, secured by Article I, Section 1, of the Constitution of the State of California, is not overcome by the showing of a compelling reason for governmental invasion of that protected individual interest in privacy, when the state court of appeal in its November 22 Decision neglects to evidence a showing of strict scrutiny in protecting Petitioner's constitutionally protected privacy interest.

A. Invasion of privacy interest requires (1) factual exposition of reasonable grounds supporting good or probable cause and (2) strict scrutiny of state statute introduced to justify invasion.

Invasion of Petitioner's zone of privacy, secured by Article I, Section 1, of the California Constitution, calls for

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medical examination with an insurance defense doctor and a psychiatrist, without setting a time, date or place therefor. See Petition, Statement of the Case, Section C.2., at Page 12. See also Petition, Appendix Page A24. See also June 4, 1992 Letter, at Appendix Pages A1-A4, attached hereto.

a factual exposition of reasonable grounds that will safely persuade an impartial tribunal that the request for such an invasion by an adversary (1) is not an abuse of a statutorily conferred right and (2) is not an abuse of Petitioner's constitutionally protected freedom to control intrusions to her bodily and psychological integrity. Division of Medical Quality v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55, 62. See also Petition, Statement of the Case, Section B., at Pages 8 and 9.

B. Statutory authorization for invasion of privacy interest requires strict scrutiny.

Reasonable grounds that will safely persuade an impartial tribunal to narrowly specify a compromise to Petitioner's zone of privacy must be sensitive to the contours of the individual's personal sovereignty:

> "The individual's right to privacy encompasses not only the state of his

mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones. The state of a person's gastrointestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library or his membership in the NAACP. We conclude the specie of privacy here sought to be invaded falls squarely within the protected ambit, the expressed objectives of Article I, Section 1. While the amendment does not prohibit all incursions into individual privacy, 'any such intervention must be justified by compelling interest' (White v. Davis, supra, 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 106, 533 P.2d 222, 234) and any statute authorizing invasion of such area of privacy must be subject to strict scrutiny." Division of Medical Quality v. Gherardini, supra, 93 Cal. App. 3d, at 679, 156 Cal. Rptr., at 61.

See also Cutter v. Brownbridge (1986) 183 Cal. App. 3d 836, 841-848, 228 Cal. Rptr. 545, 548-553; Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 263, 220 Cal. Rptr. 577, 581.

C. Administrative burden does not establish a compelling state interest.

Well settled law in the State of California secures Petitioner's freedom to control intrusions to her privacy from administrative evaluation of her

application for disability retirement.[6] An administrative burden does not establish a compelling state interest which would justify the infringement of Petitioner's fundamental right to privacy, embodied in Article I, Section 1, of the Constitution of the State of California. Central Valley Ch. 7th Step Foundation v. Younger (1979) 95 Cal. App. 3d 212, 238, 157 Cal. Rptr. 117, 131-132. See also Wood v. Superior Court (1985) 166 Cal.

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[6] The allegation by Respondent that Section 31723 authorizes multiple medical examinations can not be said to satisfy the retirement board's fiduciary obligation to deal fairly and in good faith with Petitioner. See Hittle v. Santa Barbara County Employees Retirement Association (1985) 39 Cal 3d 374, 391-394, 216 Cal. Rptr. 733, 743-745, 703 P.2d 73, 83-85. Well settled law in the State of California prohibits the use in administrative adjudication, such as in the simple administrative review of an application for disability retirement, of civil discovery methods employable in plenary litigation under California Code of Civil Procedure § 2016 *et seq.* Romero v. California State Labor Commissioner (1969), 276 Cal. App. 2d 787, 790, 81 Cal. Rptr. 281, 284.

App. 3d 1138, 1146, 212 Cal Rptr. 811, 818-819.

II. Legislation by the state courts of California of a substantive right, under the guise of equity, for a county retirement board to order a second and possibly third medical examination "to determine whether Spaletta suffered injury during the course of employment", while failing to demonstrate factual exposition of such a right from the text of the state statute under review and failing to establish factual exposition of an elusive "wrongful act" of refusal to comply with such unfound right to sustain the invasion of Petitioner's privacy interest, renders the November 22 Decision arbitrary and capricious, inconsistent with Petitioner's rights to Due Process of Law, secured by the Fourteenth Amendment.

A. Legislation by state courts of a substantive right to conduct multiple medical examinations "to determine whether Spaletta suffered injury during the course of employment," under the guise of equity, is arbitrary and capricious and merely gives facial license to arbitrary state action.

Well settled law in the State of California holds that a state court may not create substantive rights under the

guise of doing equity - that a court may not confer substantive rights when the adversary who invokes equity has none. Stein v. Simpson (1951) 37 Cal. 2d 79, 83, 230 P.2d 816, 819. See also Rosenberg v. Lawrence (1938) 10 Cal. 2d 590, 594-595, 75 P.2d 1082, 1084-1085.

From the standpoint of Due Process - the protection of the individual against arbitrary action - the withholding of evidential facts on which a court rests its conclusions renders hearings and appeals little more than empty forms designed to give facial license to arbitrary action. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302-304 (1937). Vachon v. New Hampshire, 414 U.S. 478, 480 (1974). See also Conservatorship of Valerie N. (1985) 40 Cal 3d. 143, 161-164, 219 Cal. Rptr. 387, 399-401, 707 P.2d 760, 772-774.

A hearing is not adequate in any judicial sense unless the evidence upon which the court relies in reaching its conclusions is known. Ohio Bell Telephone Co. v. Public Utilities Commission, supra, at 304. See also Morgan v. U.S., 298 U.S. 468, 480 (1936).

B. Factual exposition to justify second and possibly third medical examination "to determine the existence of the disability" absent from November 22 Decision.

The absence of factual exposition in the November 22 Decision to sustain the presence in a state statute of a substantive right for a county retirement board to order a second and possibly third medical examination "to determine the existence of the disability" and the conspicuous absence therein of the factual establishment of a "wrongful act" of refusal lay bare the conclusions of the state appellate court:

> "The board had a right to order a medical examination to determine

whether Spaletta suffered injury during the course of employment. (See Gov. Code, Section 31723.)(emphasis added) Her refusal to submit to the examination constituted a wrongful act."[7]

November 22 Decision. See Petition, at Appendix Page A7. See also Petition, Statement of the Case, Section C.4., at Pages 13 to 15, inclusive.

III. The issue of Due Process of Law and the unconstitutional application of California Government Code, Section 31723, to the facts of a second and third medical examination, establishing jurisdiction in this Court pursuant to 28 U.S.C. 1257,

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[7] The November 22 Decision here sidesteps the issue by finding that a single medical examination is authorized by Section 31723 "to determine whether Spaletta suffered injury during her course of employment," notwithstanding the express words of Section 31723, limiting the substantive right of a county retirement board to one that may require a single medical examination "to determine the existence of the disability." See Petition, Applicable Constitutional Provisions and Statute, at Page 6, Statement of the Case, Section C.4., at Pages 13 to 15, inclusive, and November 22 Decision, at Petition Appendix Page A7. Petitioner (not her adversaries) has the burden of proof in the administrative process at hand to prove the causal relationship between her physical injury and her employment activities. Lindsay v. County of San Diego Retirement Board (1964) 231 Cal. App. 2d 156, 160, 41 Cal. Rptr. 737, 740-741.

have been central to the decisions of record in this case from the time the retirement board practitioners initiated this injunctive litigation at the state trial court level, based upon the unsubstantiated wrongful act of refusal, misquoted from the text of the June 4, 1992 Letter, to the time the state court of appeal denied Petitioner's petition for rehearing of its November 22 Decision, rendering final and subject to appeal to the Supreme Court of the State of California on Due Process grounds the fact finding failures of that November 22, 1993 decision.

A. Supreme Court jurisdiction under 28 U.S.C. 1257 requires a state court decision that holds a state statute applicable to a particular set of facts against the contention that such application is invalid on federal grounds.

Clear decisions of this Court establish that a state statute is sustained and jurisdiction is conferred on this Court by 28 U.S.C. 1257, when a state court holds that statute applicable to a particular set of facts, as against the contention that such application is invalid on federal grounds. Volt Information Sciences, Inc. v. Board of Leland Stanford Junior University, 489

U.S. 468, 473 n. 4 (1989), citing *inter alia* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n. 3 (1963) and Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-290 (1921)

B. Petitioner raised the issue of her rights to Due Process of Law before the state trial court and before the state court of appeal with fair precision and in due time.

The failure of the state court of appeal to correct the absence of factual exposition in its November 22, 1993 Decision to justify the trial court's attempted invasion of Petitioner's bodily and psychological integrity was complete with the rejection of Petitioner's petition for rehearing before that court - on December 20, 1993.[8]

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[8] Petitioner had specifically referred to the state trial court's invasion of her constitutional right to privacy in her Consolidated Reply Brief, at Pages 12 and 13, filed with the state court of appeal more than two (2) months prior to that court's November 22 Decision. The attempt by Respondent to avoid the clear meaning of Section 31723 and to create substantive rights to conduct multiple medical

It is beyond question that the state court of appeal November 22 Decision that holds a state statute applicable to a particular set of facts, based on a record lacking any relevant facts as crucial elements to the application of that state statute violates Due Process and brings the necessary intendment of the November 22 Decision denying Petitioner's Due Process rights into the jurisdiction of this Supreme Court. See Vachon v. New Hampshire, supra, at 480.

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examinations in the face of the express text thereof, under the guise of doing equity, had previously been presented by Petitioner to the state trial court as an issue of unconstitutional delegation of powers and acknowledged by Respondent as a Due Process issue before the trial court. (CT 229) (RT 42-45).

Dated: August 23, 1994

Respectfully submitted

/s/ James Reyer, Esq.

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Counsel to Petitioner

APPENDIX

JUNE 4, 1992 LETTER FROM PETITIONER'S COUNSEL REQUESTING LEGAL AUTHORITY THAT SECTION 31723 AUTHORIZES SECOND AND THIRD MEDICAL EXAMINATIONS WITH INSURANCE DEFENSE DOCTOR AND WITH PSYCHIATRIST (CT 17-18)

PHYL ALLEN DIRI
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RECEIVED JUN 04 1992

Anthony E. Graham, Esq.
Graham, Cone, McKinney, Roberts
& Jackson
45060 Ukiah Street
Mendocino, CA

Re: In re Application of Marsha Young

Dear Mr. Graham:

Government Code Section 31723 states: "The Board may require . . . a medical examination at the expense of the member, as it deems necessary or the board may [sic] upon its own motion may order a medical examination to determine the existence of the disability."

Mrs. Spaletta does not claim a psychiatric injury. You have obtained an order signed by Mr. Knudson that she see a psychiatrist. Inasmuch as she is only claiming a physical injury, I do not see that the board has any right whatsoever to request a psychiatric, rather than a medical, examination.

Also, I'd like to refer you to 58 CAL JUR 3d, "Statutes," Section 136:

> "Although, ordinarily, the word 'and' connotes a conjunctive meaning, while the word 'or' implies a disjunctive or alternate meaning, these words may sometimes be substituted for each other in construing statutes. But this substitution is sanctioned only where a construction is

> "necessary to carry out the obvious intent of the legislature as gleaned from the context, or where the acts [sic] itself furnishes cogent proof of legislative substitution [sic]."

The word "or" in 31723 evidently means "or" in the ordinary sense. As I mentioned to you on the phone before you abruptly hung up on me, Mrs. Spaletta has had a medical examination at her own expense, she submitted the results to the board and to you in answer to interrogatories, and you took a lengthy deposition of her physician, Dr. Anderson, in Santa Rosa.

I shepardized 31723 and could find nothing to indicate to me that your interpretation of the statute, that a medical examination at the expense of the member AND a medical examination by another doctor, in this case, an insurance defense doctor, may be required.

If you can send me authority for your interpretation, I will be glad to consider it.

If you cannot, then Mrs. Spaletta does decline to attend the examinations you have set up.

Sincerely,

/s/ Phyl Allen Diri

Phyl Allen Diri

PAD:hs

cc: Sandra Applegate,

Deputy County Attorney